Rice Food Markets, Inc. ***and*** **Retail Clerks Union, Local No. 455, Chartered by United Food and Commercial Workers International Union, AFL-CIO.**[1] Case 23-CA-6622

April 10, 1981

DECISION AND ORDER

On May 7, 1980, Administrative Law Judge Melvin J. Welles issued the attached Decision in this proceeding. Thereafter, the General Counsel and Respondent filed exceptions, supporting briefs, and answering briefs.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[2] and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Rice Food Markets, Inc., Houston, Texas, its officers, agents, successors, and assigns, shall take action set forth in the said recommended Order, as so modified:

1. Insert the following as paragraph 2(c) and reletter the subsequent paragraphs accordingly:

"(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order."

2. Substitute the attached notice for that of the Administrative Law Judge.

IT IS FURTHER ORDERED that the complaint allegations not specifically found herein be, and they hereby are, dismissed.

[1] The name of the Union, formerly Retail Clerks Union, Local No. 455, chartered by Retail Clerks International Association, AFL-CIO, is amended to reflect the merging of Retail Clerks International Unoin and Amalgamated Meatcutters and Butcher Workmen of North America on June 7, 1979.

[2] The General Counsel and Respondent have excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

255 NLRB No. 118

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to recognize and honor Retail Clerks Union, Local No. 455, United Food and Commercial Workers International Union, AFL-CIO, as the exclusive bargaining representative of employees in the appropriate unit.

WE WILL NOT refuse to apply the terms and conditions of our collective-bargaining agreements with the above-named Union to our employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL, upon request, honor our 1975 contract, and any succeeding contract with Local No. 455, with respect to our employees in the following appropriate unit:

> All employees in our retail food stores and adjacent Beverage Mart liquor stores in Harris, Galveston, Montgomery, and Walker Counties, Texas, excluding store managers, assistant store managers, management trainees, all meat department employees, office clerical employees who work separately and apart from the retail food stores, professional employees, guards, watchmen, and supervisors as defined in the L.M.R.A., as amended.

WE WILL make whole the aforesaid Beverage Mart employees for any losses, including loss of benefits, they may have suffered because of our failure to honor our contract with the Union with respect to them, with interest.

RICE FOOD MARKETS, INC.

DECISION

STATEMENT OF THE CASE

MELVIN J. WELLES, Administrative Law Judge: This case was heard in Houston, Texas, on March 15 and 16, 1978, based on charges filed July 14, 1977, and amended September 12, 1977, and a complaint issued November 2, 1977, alleging that Respondent violated Section 8(a)(1), (3), and (5) of the Act. The General Counsel and Respondent have filed briefs.

Upon the entire record in the case, including my observation of the witness, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT AND LABOR ORGANIZATION INVOLVED

Respondent, Rice Food Markets, Inc., hereinafter referred to as Rice Foods, is a Texas corporation engaged in the retail sale of food and related items and products, with its principal office and place of business in Houston, Texas. During the calendar year preceding the complaint herein, the Company had gross sales volume of business in excess of $500,000. During the same period of time, it purchased and had shipped to it in Texas, directly from points outside the State of Texas, goods valued in excess of $50,000. I find, as Respondent admits, that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act. Retail Clerks Union, Local 455, Chartered by United Food and Commercial Workers International Union, AFL-CIO, Local 455, herein called the Union, is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

Respondent operates a chain of retail grocery stores, employees of which have been represented by the Union since 1968, with a series of collective-bargaining agreements. The 1975 contract, expiring in 1978, covered "all employees" in the Company's stores in various Texas counties in the Houston area, excluding, *inter alia*, meat department employees. From 1968 until some time in 1976, the Company had liquor departments in its various stores; liquor, during that period, being regarded as just another grocery item at least until 1971, and after 1971 being sold in "separate" liquor departments, partitioned off from the rest of the store. This change followed enactment of a Texas statute that required liquor to be sold separately from other groceries.

Ralph Cohen, Senior vice president of Rice Foods testified that there was a "question mark in my mind" as to whether the liquor department employees were covered by Respondent's contracts with the Union. He admitted, however, as Respondent does in its brief, that these departments were in fact paid all the benefits, including wage rates, had pension and welfare payments made for them, and had their dues deducted pursuant to checkoff authorizations. As the unit description does not exclude the liquor department employees (as it does the meat department employees), and in light of the fact that Respondent concedes that "the employees of the Liquor Department of the Company were treated as if they were covered by the contract," I conclude that they were so covered that period.

In 1975, Texas enacted another statute relevant to the situation here. This new statute required the total separation of liquor departments from grocery departments. As early as 1965, Rice Food had formed a wholly owned subsidiary (Beverage Mart Discount Food No. 1), which had opened a series of retail operations adjacent to different Rice Markets, and which were called Beverage Marts. Some "free-standing" Beverage Marts (not involved in this litigation) also existed prior to the 1975 amendments to the Texas Alcoholic Beverage Code. These stores were opened as a result of business judgment, and not, of course, as the result of the subsequent legislation. As a consequence of the 1975 statute, Rice Food's board of directors determined to convert those liquor departments existing within the grocery stores into "separate facilities," called Beverage Marts.[1] Two "freestanding" Beverage Marts were opened, neither of which is involved in this case. The Company also remodeled its liquor departments at five stores, beginning June 1, 1976, with Beverage Mart No. 55, and ending on August 1, 1977, with Beverage Mart No. 54. The remodeling included the erection of walls between the liquor departments and the remainder of the five stores in question, and building separate entrances for the liquor departments, now all called, as were the freestanding liquor stores, Beverage Marts. Other facts that differentiated the new Beverage Marts from the old liquor departments from which they emerged will be considered in the ensuing discussion, as will those facts that may indicate similarities between the two.

With respect to the corporate structures of Rice Foods and Beverage Marts—the latter, as mentioned earlier, is a wholly owned subsidiary of the former, and has existed as such since 1965. The six-person board of directors of Rice Foods and Beverage Marts are the same. The senior vice president of Rice Foods, Ralph Cohen, is also senior vice president of Beverage Marts. Cohen testified that his "responsibility has been the management and supervision of the Beverage Mart Liquor package stores, as well as other buying and merchandising responsibilities, advertising responsibilities, of the Rice Food Markets." He also has the overall immediate responsibility for the advertising for both Rice Foods and Beverage Marts. Cohen had "buying responsibilities, merchandising responsibilities, general policy on how the operation is to be run, and to a certain extent employee policies," with respect to the liquor departments since long before either of the Texas statutes referred to above was enacted or the liquor departments became in any way separated from the grocery stores. The employees in the liquor departments were paid the contractual wage rates and received all the pension and welfare benefits contained in the contract. In fact, with respect to the application of the contract to the liquor departments, Cohen replied "I suppose so, yes," to the question whether the contract was so applied, although he testified that "the contract was always a question mark in my mind as to the control the Union had over the liquor departments." Cohen also testified that "certain allocations were made" whereby the labor costs of a manager or assistant manager of the grocery store were charged against the liquor department of the store.

B. *The 8(a)(5) Issue*

The nature of the alleged unlawful refusal to bargain in this case, including when it occurred, if it did, is somewhat murky. It is not clear whether the Company's "re-

[1] Beverage Marts was formed in 1965, as a wholly owned subsidiary of Rice Food Markets, Inc.

modeling" of the liquor departments at five stores "without any consultation, negotiation and/or discussions with the Union" (G.C. br. p. 2) is itself alleged as violative of Section 8(a)(5). Nor is it clear whether any specific conduct or act by Respondent at any particular date is alleged to have violated Section 8(a)(5).

The General Counsel's brief states the "issues" with respect to the 8(a)(5) aspect of the case as "Whether the employees of Respondent who worked in the liquor departments prior to their being converted to Beverage Marts and/or prior to their being discontinued sometime in 1977 were covered by the collective-bargaining contracts between Respondent and the Union," and "Whether Respondent's wholly owned subsidiary, Beverage Mart, is so functionally integrated with Respondent as to constitute the two corporations a single employer for Board purposes." At another point, the General Counsel refers to "the violations committed by Respondent on June 21 and September 20, 1976, when it opened Stores No. 55 and No. 57 respectively." But the principal thrust of the General Counsel's position is that the changes that occurred did not excuse Respondent from its obligation to continue to bargain with the Union for the Beverage Mart employees as part of the overall unit.

The gravamen of Respondent's position is that the employees of the newly commenced Beverage Mart operations did not and do not constitute an "accretion" to the existing multistore unit under recognized and established Board principles governing "accretion" situations, and therefore that the employees in those operations "were not members of the Company unit."

The difficulty lies in the fact that there is no single specific date or act on which to focus. The "new" Beverage Mart operations did not come into existence all at once. Nor did the Company ever announce that it no longer regarded the Union as the bargaining agent for the employees at those operations. The "10(b) issue"[2] emphasizes the conceptual difficulty in this case. To the extent that the commencement of operations at each Beverage Mart, without bargaining with the Union, constituted a violation of Section 8(a)(5), Section 10(b) would on its face preclude any violation from being found with respect to Beverage Marts Nos. 55 and 57, each of which was opened more than 6 months prior to the Union's July 14, 1977, charge. Were each changeover therefore to be viewed as a separate violation, a unilateral change effected without bargaining with the Union, these two changes would be barred by Section 10(b).[3]

[2] The General Counsel's brief addresses this issue; Respondent's does not. Respondent does advert in its brief to its argument, and continuing objection raised at the hearing, that no evidence of anything that occurred more than 6 months prior to the filing of the charge should be considered.

[3] The General Counsel does point to the Company's failure to notify the Union of these changes, and certain of its actions which had the effect of keeping the changes from coming to the attention of the Union, as tolling the operation of the 10(b) statutory 6-month limitations period. Were it necessary to do so, I would find merit in the General Counsel's position in this respect. I do not find it necessary to do so because, as fully developed below, I view the 8(a)(5) issue here in terms of whether all Beverage Mart stores (except the freestanding ones) remained part of the overall unit covered by a contract with the Union.

One clear fact does emerge from the record in this case, including the pleadings and the briefs filed with me; Respondent did not at the time of the hearing recognize the Union as the bargaining representative of the Beverage Mart employees at those locations that had formerly been liquor departments. And whether Respondent should have continued to recognize the Union depends on whether the changes effected were sufficient to remove those employees from the bargaining unit represented by the Union for at least the past 10 years.[4]

Although Respondent supports its position that it was no longer required to bargain for the Beverage Mart employees, after effecting the changes mandated by the 1975 Texas statute, by "accretion" principles, these principles, developed by the Board over the years, have peripheral rather than direct application here. Normally, the question whether or not there is an accretion to an existing bargaining unit involves a new group of employees. The simplest form of "accretion" is the hiring of new employees to enlarge an existing complement. Naturally, the new employees are part of the existing unit, and the matter is so simple that the term "accretion" is not even utilized. When the new group of employees is separately located and supervised, or performs separate and distinct functions from those performed by employees in the existing unit, then they must be found to be an "accretion" in order to be part of the existing unit.[5]

Typical cases where accretion is the focal point are the addition of one or more retail stores to an existing chain of stores in a particular locality, or the addition of a new plant to a company's existing plants. Although many factors go into the determination of whether or not an accretion will be found, all of those factors go toward deciding whether the new group is closer to hiring new employees at an existing facility, or to being a wholly new and separate facility, so separate that the employees at the new facility have no, or so little, community of interest with the employees at the old facility as to make their inclusion in an existing unit unwarranted.

The reason that accretion principles are not precisely applicable here is because the "new" facilities at issue, the five Beverage Marts, are not wholly new, either in function, in staffing, or in location. In a sense, the situation here is not much different from what would be the case had Rice Foods determined to separate its bake shops from the rest of the food operations and, as it did

[4] The Company contends in its brief, that "the 8(a)(5) allegation is not properly before this Administrative Law Judge. It would be properly before the NLRB upon a Petition for Union Clarification." Perhaps the Company or the Union could have filed a petition for unit clarification and had the matter resolved that way. But this kind of unit problem is often resolved, and is of course resolvable, in an unfair labor practice proceeding, the same Board ultimately making the determination. Furthermore, the Company, having chosen to resolve the matter by itself, rather than by filing a "UC" petition, is now in a position where it has violated the Act if it took an erroneous view. The unit clarification route at this juncture would not provide any remedy for such violations.

[5] The determination of whether they constitute an accretion can arise in the context of the employer refusing to recognize the incumbent union as their representative, by the employer's recognition of the union as their representative being challenged as unlawful assistance, or in a unit clarification context.

with the Beverage Marts, build partitions and separate entrances, and call them Bake Marts. What we have here, then, is more of a spinoff from than an addition to the existing supermarkets. It is not, and this is the significant point, the same as opening a new food (or liquor or bakery) store would be. Even in the latter situation, the Board has time and again found that new stores constituted accretions to existing multistore units; although it has also refused to find accretions in some instances. See, for example, *Safeway Stores, Inc.*, 175 NLRB 875 (1969), and contrast the Board's finding of accretion there with respect to clerks assigned to the nonfood departments, with the refusal to find accretion as to the clerks at the snackbars. See also *N.L.R.B.* v. *Baton Rouge Water Works Company*, 417 F.2d 1065 (5th Cir. 1969); *Richfield Oil Corporation*, 119 NLRB 1425 (1958); *Lansing General Hospital*, 220 NLRB 1 (1975); *Food Marts, Inc.*, 200 NLRB 18 (1972); *Avondale Shipyards, Inc.*, 174 NLRB 73 (1969).

This is a roundabout way of saying that a division of an existing facility cannot and should not be viewed in precisely the same manner as the addition of a new facility or facilities. Even in circumstances where a new facility would not be viewed as an accretion, because of factors such as the distance from other facilities, lack of interchange, autonomy in labor relations, and other factors considered relevant to a determination *vel non* of accretion, it would not necessarily follow that the spunoff portion of an existing facility would no longer be considered part of the overall existing unit.

In practical effect, there is a heavy burden on a party seeking to prove "accretion" to show that the group sought to be added to an existing unit is an "accretion" within the meaning of the Board's longstanding use of that term, whether it be a union claiming that group (in an 8(a)(5) case, for example), or an employer seeking to justify its recognition of that group (in a 8(a)(2) case, for example). When, as here, an employer attempts to justify *removing* a particular group or groups from the coverage of a collective-bargaining agreement or relationship, it has the burden of showing that the group is sufficiently *dissimilar* from the remainder of the unit so as to warrant that removal. For example, had the Beverage Mart portion of Rice's operations first come into being in 1977, with everything else being the same in terms of their operations as the record shows for them after they became "separate," perhaps the Company would have been required to add them to the existing unit (a unit that, by hypotheses, had not included them for they were not in existence).[6]

The facts of this case, in my view, even accepting at full face value the Company's characterizations, fall far short of justifying the Company in refusing to continue to recognize the Union as the bargaining representative of the Beverage Mart employees. Thus, Ralph Cohen, who is the senior vice president in charge of both Rice and Beverage Mart, testified that Stan Davis, general manager of Beverage Marts, "can be called a Rice employee." Nichols, a wine and liquor buyer for Rice prior to the conversions, continued to buy liquor and wines for Beverage Mart, as well as for Rice, thereafter, and was continuing to do so at the time of the hearing herein. Personnel functions for both Rice and Beverage Marts are handled at a single location, with employee pay checks for both issued by a single payroll department, and in the name of Rice Foods. At the end of the day, all cash from the Beverage Mart operations is picked up by the grocery store manager. Telephone lines at the grocery stores and the liquor stores can be answered at either location, and, at at least one facility, a common public address system existed.

It is true that there were some changes in the operations and functioning of the Beverage Marts after the conversions. Thus, as Respondent points out, some products are now sold in the Beverage Marts that were not sold in the liquor departments of the grocery stores, but in the other portions of those stores. These products are items such as glasses, bar supplies, cigarettes, tobacco, and mixers, all "related" to the liquor sales. These items, however, are still all handled in the grocery stores. Ralph Cohen testified that he was not aware of any interchange between the grocery stores and the Beverage Marts, but he also admitted that he would not have been aware of such matters. He also testified that had there been any interchange, that would have been in violation of his instructions.

Although Stan Davis, as general manager of Beverage Marts, controls Beverage Marts' hiring and firing, and, according to his testimony, is "totally responsible for sales, merchandising, operations and advertising, and personnel" for Beverage Marts. However, as noted above, Ralph Cohen, as senior vice president of both Rice Foods and Beverage Marts, testified that "my responsibility has been the management and supervision of the Beverage Mart liquor package stores, as well as other buying and merchandising responsibilities, advertising responsibilities, of the Rice Food Markets." And Davis reports to Cohen.

To the extent that Respondent relies on the fact that the Beverage Mart employees have separate "personal appearance guidelines," or separate "merchandising guidelines"; or the General Counsel relies on the fact that the same type of uniform was worn by the checkers at Beverage Marts as were worn at Rice Foods, and that the signs of the two are similarly colored, and that the telephone book listings are the same for both, I regard these factors as too inconsequential to have a bearing on the ultimate question.

In sum, the similarities between Rice Foods and Beverage Marts, and the degree of control by the former over the latter, following the changes mandated by the 1975 Texas statute, far outweigh the differences effected by those changes. I am satisified that the bargaining unit that existed prior to those changes is still a viable unit, that Respondent has not demonstrated otherwise, and that the General Counsel has amply shown such to be the case.

Respondent argues that the Union "waived" bargaining with respect to the Beverage Marts by the statements

[6] Although even in that posture, there would probably be sufficient similarities to warrant their being added to the existing unit if the employees manifested their desire for representation by the same union by an election or any other reliable means.

of Union President Ray Wooster to Bud Freedman, Respondent's assistant director of personnel and director to labor relations, that the Union was "not interested in any of the Beverage Marts." At the time of this statement, however, there were only two freestanding Beverage Marts, Nos. 48 and 18, neither of which is involved in this proceeding. I agree with the General Counsel that Wooster's statement made in that factual context cannot be viewed as a waiver of its representation rights with respect to the contiguous Beverage Marts. Furthermore, as noted above, there is no indication that the Union knew anything about the contiguous Beverage Marts until the Linda Trezvant incident, described hereafter.

C. *The Facts—Linda Trezvant*

Linda Trezvant applied for work with the Company in December 1976. She was interviewed in the personnel department, and the person who interviewed her[7] put "C-5" on her application, category calling for $5.84 an hour. She was told that the Company did not need any help at that time. Trezvant "heard" later that month that there was an opening at store no. 6. She returned to the personnel office, and was sent to that store to talk to its manager, Jewell Alex. Alex, in turn, sent her to see the manager of the liquor department, John Evans. Evans told Trezvant, according to her, that she would have to start "as a part-time," because the store was being remodeled, but that she would become full-time in 2 weeks. When she reported for work the next day, March 29, she asked Evans what her salary would be. She told Evans that she saw C-5 written on her application when she was interviewed. He replied that the liquor department starting rate was $3.25 an hour, and she began at that rate.

Sometime in the middle of April, Trezvant spoke with Union Business Agent Henry Duphily, telling him that she wanted to join the Union, because she was making only $3.25 an hour. He said he would check into it. She then asked Evans about getting a raise. He said that she would have to speak with Stan Davis, the manager of Beverage Marts. She also told Evans that she was going to try to get into the Union so she could get her "correct pay." Evans replied that "there was no way because I was not in the bargaining unit." A day or two later, Stan Davis came into the store, and Trezvant asked him about a raise. Davis told her, according to Trezvant, that she would have to go to a store on the south side to get a raise. Trezvant said she would not do that because she was hired for store no. 6. She also told Davis that she was going to "get in the Union so that I could get my correct pay," and he replied that she was not in the bargaining unit, and could not get in the Union.

Davis testified that he first spoke with Trezvant in late April or early May. Trezvant "questioned her pay rate," and asked Davis to investigate the situation. She also asked him about becoming "full-time," indicating that Evans told her she would achieve that status. Davis testified that he then spoke with Evans, who told him that he had not promised Trezvant a raise, but that he had told her that if she did a good job she would be considered for a raise. Davis then "investigated the possibility of . . . scheduling her into a situation where it would be full-time and possibly at a higher rate." He decided that he could move Trezvant to another store, and "accommodate a raise." He then called Trezvant and told her that he could offer her a full-time position, at another store, and that if she would agree to move, salary changes could be discussed. She replied that she would not move, that she was hired for store no. 6, and was going to stay there. Finally, Davis told Trezvant once more that she could transfer, but that if she did not, the Company would no longer need her, because they did not have a position for her at store no. 6. Davis testified that Trezvant never discussed the Union with him, although she did refer to the checkers at the grocery stores in discussing what she believed she should be paid.

The following week Davis again offered the transfer to Trezvant, and she made the same response, that she would not move from store no. 6.

Trezvant again spoke with Union Business Agent Duphily on June 1, and filed a grievance about her pay rate. On June 6, when Trezvant reported to work, a new employee, Lynn Kehoe was at the store. Evans told Trezvant not to report for work the next day because "they were starting just two people to operate the liquor department, assistant manager and manager." She told Evans she would report for work the next day "because I was on schedule and he couldn't give me a reason why I was being terminated." She did report for work again the next day. Her timecard was not in its slot, so she went to the courtesy booth. The courtesy booth operator, "Virginia," told her she had been told by Evans not to give her her card or her till. Trezvant prevailed on Virginia to give her the time card. She clocked in and went to the liquor department. Lynn Kehoe was there checking. Later, Kehoe contacted Evans by phone, telling Evans that Trezvant had reported for work. Kehoe handed the phone to Trezvant. He asked her what she was trying to accomplish, that he had told her not to report for work that day. She replied that she was on schedule and would stay there. She then called Duphily, explaining what had occurred. He told her to remain where she was until he spoke with Evans. He subsequently called back and told Trezvant to leave the store with pay for the rest of the week.

The following Monday, Trezvant again reported in to work. Virginia, at the courtesy booth, told her she had been instructed not give Trezvant her timecard or her till. She then called Store Manager Gurka, who came, and Trezvant was given her timecard. She then clocked in and went to the liquor department. Gurka, Stan Davis, Bob Clark, and a security guard known as "Huey" to Trezvant, were all present. Trezvant asked Clark why she was being terminated, and Clark first walked away. Trezvant persisted, and Clark then merely said she was no longer an employee at the store. Gurka then asked Huey if he could have Trezvant removed from the store.

[7] Although Trezvant testified that she was interviewed by Bud Freedman, assistant director of personnel and director of labor relations for Rice Foods, she testified, on cross-examination, that the person who interviewed her never told her his name; she merely remembered that he had dark hair and wore glasses. Freedman denied ever seeing Trezvant before the hearing in this case. In the circumstances, I credit Freedman.

Huey replied he could not, as it was a public store, but that he would call the police.

About half an hour later, a policeman showed up. After he talked with Clark, out of Trezvant's hearing, the policeman asked Trezvant to leave. She protested that she was an employee, but he said Clark had told him she was not an employee any longer.

D. *Discussion—The Alleged 8(a)(3) violation*

The General Counsel argues that Linda Trezvant was discharged because she in effect "blew the whistle" on the Company's alleged scheme to take the liquor store employees out of the Union. As noted above, I do not believe that the Company was in fact pursuing a devious method of changing its liquor store operations for the purpose of concealing from the Union what it was doing. Rather, Respondent was seeking to comply with the Texas statutes in making the physical separations of the grocery and liquor departments. That this separation did not result in separate entities for the purpose of Section 9 and Section 8(a)(5) of the Act, as found above, signifies only that the Company has lost, up to this point at least, its legal arguments.

I cannot conceive of the Company attempting to, or believing it could successfully, conceal such changes from the Union, or keep the Union in the dark about the fact that the Company no longer viewed the liquor store employees as part of the unit. That being so, the General Counsel's "blow the whistle" argument must fail. An alternative theory suggests itself—that the Company fired Trezvant for insisting on contractual rights, with the Company viewing the contract as inapplicable to her. This would be a tenable theory, except for the fact that the Company was willing to, and indeed twice offered to, transfer her to a Rice Food location elsewhere at a higher wage rate. Had retaliation against her for "blowing the whistle" or insisting on contractual rights been the motivation for the discharge, Respondent would not, it seems to me, have been offering Trezvant the increase or willing to keep her in its employ. The General Counsel's theory, in short, is entirely too speculative, is not supported by substantial evidence, and therefore I am constrained to conclude that the complaint's allegation of a discriminatory discharge as to Trezvant has not been shown.

In so concluding, I have not overlooked the other arguments advanced by the General Counsel. Thus, the General Counsel asserts in his brief that General Manager Stan Davis "as early as April . . . was aware that this $3.25-per-hour employee was about to expose Rice's grandiose plan of unilaterally taking all the liquor employees out of the bargaining unit and was thus in a position of raising to a substantial degree the operating costs of the Beverage Marts. It is not without wonder, therefore, asserts the General Counsel, "that the Company had to immediately set a motion in plan to rid itself of this troublemaker." But the conversation between Trezvant and Evans, which was the forerunner of her conversation with Davis, occurred in mid-April, 2 weeks after she was first hired as a part-time employee. The General Counsel would have it that getting rid of Trezvant "was not an easy task since Trezvant was a good worker and the Company was going to have to find some other pretext to rid itself of her." But I doubt that only 2 weeks of part-time work would have been enough to establish in the Company's mind (Evans or Davis) that Trezvant was such a good worker as to require an elaborate plan in order to get rid of her.

Indeed, had the Company's concern been solely the possibility that its presumed secret and nefarious scheme to rid itself of the Union for its Beverage Mart employees would be disclosed by Trezvant, it would have been simplicity itself to have given her the extra $2.60 an hour, a cheap price to pay for preserving its "guilty secret." Furthermore, Trezvant had already told both Evans and Davis that she was going to the Union, long before her discharge, so that perserving the secret was no longer a factor to be considered. Her own testimony that Davis told her she could get a raise by transferring also suggests that the Company honestly did not need her services at the Beverage Mart store no. 6. Trezvant testified that she rejected the proposal to transfer because of personal inconvenience. There is no indication, however, that the Company knew this, or had any inkling that Trezvant would refuse a transfer. For all these reasons, I shall dismiss the complaint's allegation that Trezvant was discriminatorily discharged.

Upon the basis of the foregoing findings of fact and the entire record, I make the following:

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. Retail Clerks Union, Local No. 455, chartered by United Food and Commercial Workers International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.
3. All employees in Respondent's retail food stores and adjacent Beverage Mart liquor stores in Harris, Galveston, Montgomery, and Walker Counties, Texas, excluding store managers, assistant store managers, management trainees, all Meat Department employees, office clerical employees who work separately and apart from the retail food stores, professional employees, guards, watchmen, and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.
4. By refusing to recognize and bargain with the Union as the exclusive bargaining representative of all employeee in the aforesaid bargaining unit, and by refusing to apply the terms and conditions of the collective-bargaining agreement with the Union to the Beverage Mart employees, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.
5. Respondent has not violated the Act in any other respect.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices by refusing to bargain with the Union concerning the employees at its Beverage Marts, as part of the appropriate unit found above, I shall recommend that Respondent be ordered to cease and desist therefrom, and to take certain affirmative action necessary to effectuate the policies of the Act. Specifically, Respondent shall be ordered not only to recognize the Union as the representative of the Beverage Mart employees as part of the overall unit, but also to make whole those employees at the Beverage Mart operations for any losses they may have suffered as a result of Respondent's failure to apply its 1975 contract, or any succeeding contracts, to those employees, by payment to them of any wage differentials from the contract rate, and by making all pension, health and welfare payments, and any other contributions required by the bargaining agreements. Any backpay is to be computed as provided in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest as set forth in *Florida Steel Corporation*, 231 NLRB 651 (1977).

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[8]

The Respondent, Rice Food Markets, Inc., Houston, Texas, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to recognize Retail Clerks Union, Local No. 455 Chartered by United Food and Commercial Workers International Union, AFL-CIO, as the exclusive-bargaining representative of the employees of Beverage Mart as part of the unit found appropriate herein.

(b) Refusing to apply the terms and conditions of its collective-bargaining agreements with the Union to its Beverage Mart employees.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed them Section 7 of the Act.

2. Take the following affirmative action in order to effectuate the policies of the Act:

(a) Upon request, honor the collective-bargaining agreement of 1975, and any extension therefor, with respect to the Beverage Mart employees found to be part of the appropriate bargaining unit herein.

(b) Make the aforesaid Beverage Mart employees whole for any losses they may have suffered by reason of Respondent's failure to apply the terms of its 1975 contract, or any succeeding contract, to them in the manner prescribed in the "Remedy" section hereof.

(c) Post at its stores and places of business, at all locations comprising the appropriate unit herein, copies of the attached notice marked "Appendix."[9] Copies of the notice on forms provided by the Regional Director for Region 23, shall be signed by an authorized representative of Respondent and be posted immediately upon receipt thereof, and maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 23, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

[8] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[9] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."